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Seventh report on the protection of persons in the event of disasters

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Addendum

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I. Introduction

1. In conformity with the Commission's practice, as reflected in most of the draft articles it has thus far adopted on diverse topics of international law, the Special Rapporteur proposes the inclusion in the present draft articles of a provision on the "use of terms". The formulation of such a provision can be most efficiently achieved when, as it is the case at present regarding the topic "Protection of persons in the event of disasters", the text of all of the draft articles on a topic will have been adopted by the Commission. This is without prejudice to the ultimate location of the use-of-terms provision in the set of draft articles, which in the past has always been at the beginning, either as the first of the series or following the provision on scope. As regards the present topic, however, since the draft includes provisions on the scope (draft article 1) and purpose (draft article 2), as well as on the definition of disaster in a separate autonomous provision (draft article 3), the draft article on the use of terms proposed below is provisionally numbered 3 bis.

2. In elaborating his proposal, the Special Rapporteur focused first on terms that, according to the commentaries to the draft articles, were already singled out for definition in a provision on the use of terms, as well as on terms that are often encountered in the draft articles and on terms of art. On this basis, he has identified the following key terms for inclusion in draft article 3 bis: affected State; assisting State; other assisting actor; external assistance; equipment and goods; relevant non-governmental organization; relief personnel; and risk of disasters. The Special Rapporteur next examined the commentaries to ascertain whether there were elements of a definition already adopted by the Commission. He then turned to the applicable definitions found in other instruments. Having recourse to all of these sources, he has arrived at a list of composite definitions, either taking elements from different sources, as appropriate, or using one as a basis but modifying it to reflect the language and the decisions embodied in the draft articles already adopted.

3. For the purpose of defining the above-mentioned terms, the additional sources that have been used as being especially relevant are: annex I (Glossary) to the addendum to the memorandum by the Secretariat (A/CN.4/590/Add.1); article 2 (Definitions) of the International Federation of Red Cross and Red Crescent Societies (IFRC) Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance of 2007 ("IFRC Guidelines"); annex I (Glossary) to the Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters of 2011; the resolution on humanitarian assistance adopted by the Institute of International Law at its Bruges session on 2 September 2003 ("International Law Institute resolution"); as well as definitional provisions contained in a number of multilateral and bilateral treaties.

II. Use of terms

A. Proposal for an additional draft article

4. The Special Rapporteur proposes the following text for a draft article 3 bis on the use of terms:

Draft article 3 bis

Use of terms

For the purposes of the present articles:

(a) "Affected State" means the State upon whose territory persons or property are affected by a disaster;

(b) "Assisting State" means a State providing assistance to an affected State at its request or with its acceptance;

(c) "Other assisting actor" refers to an international organization, non-governmental organization, or any other entity or person, external to the affected State, which is engaged in disaster risk reduction or the provision of disaster relief assistance;

(d) "External assistance" refers to relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors, with the objective of preventing, or mitigating the consequences of disasters or meeting the needs of those affected by a disaster;

(e) "Equipment and goods" includes supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects necessary for the provision of disaster relief assistance and indispensable for the survival and the fulfilment of the essential needs of the victims of disasters;

(f) "Relevant non-governmental organization" means any organization, including private and corporate entities, other than a State or governmental or intergovernmental organization, working impartially and with strictly humanitarian motives, which because of its nature, location or expertise, is engaged in disaster risk reduction or the provision of disaster relief assistance;

(g) "Relief personnel" means specialized personnel, including military personnel, engaged in the provision of disaster relief assistance on behalf of an assisting State or other assisting actor, as appropriate, having at their disposal the necessary equipment and goods;

(h) "Risk of disasters" means the probability of harmful consequences or losses with regard to human life or health, livelihood, property and economic activity, or damage to the environment, resulting from a disaster.

B. Brief analysis

(a) "Affected State" means the State upon whose territory persons or property are affected by a disaster

5. The term "affected State" appears in seven of the draft articles already adopted, namely, draft articles 9 (Role of the affected State); 10 (Duty of the affected State to seek assistance); 11 (Consent of the affected State to external

assistance); 12 (Offers of assistance); 13 (Conditions on the provision of external assistance); 14 (Facilitation of external assistance); and 15 (Termination of external assistance); as well as in proposed draft article 14 bis (Protection of relief personnel, equipment and goods).

6. The International Law Institute resolution defines the term "affected State" as follows: "[t]he State or territorial entity where humanitarian assistance is needed".[1] The term is also defined in article 2 (8) of the IFRC Guidelines, reading as follows: "t[he] State upon whose territory persons or property are affected by a disaster".[2]

7. Subparagraph (a) is drawn verbatim from the definition provided in the IFRC Guidelines. It reflects the basic orientation that the draft articles are addressed to States. It also anticipates the centrality of the role to be played by the State affected by the disaster, as established in draft article 9. The key feature is territorial control, that is, the affected State can only play the role envisaged for it in draft article 9 over the territory it controls. The provision could go further and add "or otherwise under the jurisdiction or control", as was done in the articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001.[3] However, it was deemed preferable not to do so in order to avoid entering into an unnecessary discussion on extraterritorial jurisdiction, which is more the exception than the rule. Furthermore, the element of territorial control is a common feature of many instruments regulating the protection of persons in the event of disasters.

8. The definition further seeks to reflect the focus of the draft articles, namely the effect on persons, as opposed to, for example, simply asserting that it is the State upon whose territory a disaster takes place. The reference to property has been retained as a further element common to many disasters, and implied in the reference to "large-scale material ... damage" in the definition of disaster in draft article 3; it being understood that the draft articles apply only to the impact of economic loss on persons.[4]

9. The formulation of the phrase "affected by a disaster" reflects the contemporary view that the focus of attention is on the effects of a disaster on persons and property, as opposed to the disaster itself. It also accords with the Commission's approach of considering the consequence of the event as a key element for purposes of establishing the threshold for the application of the draft articles.[5]

(b) "Assisting State" means a State providing assistance to an affected State at its request or with its acceptance

10. The term "assisting State" appears in draft article 15 (Termination of external assistance).

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[1] Resolution on humanitarian assistance adopted by the Institute of International Law on 2 September 2003 at the session held in Bruges, Belgium, sect. I (4).

[2] International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, 2007, art. 2 (8).

[3] *Yearbook of the International Law Commission, 2001*, vol. II (Part Two) (United Nations publication, Sales No. E.04.V.17 (Part 2)), para. 97, art. 2.

[4] See A/65/10, para. 331, para. (7) of the commentary to draft art. 3.

[5] Ibid., para. (4) of the commentary to draft art. 3.

11. The formulation is drawn from the definition of "supporting State" in the Framework Convention on Civil Defence Assistance of 2000,[6] with the term "Beneficiary State" changed to "affected State", which is the term utilized in the draft articles and defined above. The phrase "a State providing assistance" is a reference to the concept of "external assistance", which is further defined below, and which is undertaken on the basis of the duty to cooperate in draft article 5.

12. The draft articles are addressed to three categories of entities; the first being the affected State (defined above), and the second being the State or States providing assistance to the affected State. The third category, "other assisting actors", is further defined below.

13. From the definition, it is clear that a State only falls into the category of "assisting State" once the assistance is being or has been provided. In other words, a State offering assistance is not an "assisting State", with the various legal consequences that flow from such categorization, as provided for in the draft articles, until such assistance has been accepted by the affected State.

14. The phrase "at its request or with its acceptance" reflects the interplay between draft articles 10, 11 and 12. In particular, it reflects the basic stance taken in the draft articles that it is the duty of the affected State to seek assistance when its national response capacity has been overwhelmed by a disaster (draft article 10). At the same time, it envisages the possibility of the affected State receiving unsolicited offers of assistance, as provided for under draft article 12, the provision of which is subject to its consent, under draft article 11.

(c) "Other assisting actor" refers to an international organization, non-governmental organization, or any other entity or person, external to the affected State, which is engaged in disaster risk reduction or the provision of disaster relief assistance

15. The term "other assisting actor" appears in draft article 15 (Termination of external assistance).

16. In addition to affected and assisting States, the draft articles also seek to regulate the position of other assisting actors. A significant proportion of contemporary disaster risk reduction and disaster relief activities are undertaken by, or under the auspices of, international organizations, including but by no means limited to the United Nations, as well as non-governmental organizations and other entities and even individuals. This group of actors is collectively referred to in the draft articles as "other assisting actors". This is without prejudice to their differing legal status under international law, which is acknowledged in the draft articles, for example, in draft article 12.

17. The provision reflects, in part, the commentary to draft article 15, which confirms the understanding that the term "assisting actors" refers primarily to international organizations and non-governmental organizations.[7] The phrase "or any other entity or person", which is drawn from the ASEAN Agreement,[8] was added to reflect the fact that not all actors which are involved in disaster relief efforts can be categorized in one or the other categories mentioned in the commentary.

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[6] United Nations, *Treaty Series*, vol. 2172, No. 38131, art. 1 (f) (definition of "supporting State").

[7] See A/68/10, para. 62, para. (4) of the commentary to draft art. 15.

[8] ASEAN Agreement on Disaster Management and Emergency Response of 26 July 2005, ASEAN Documents Series 2005, p. 157, art. 1 (1) (definition of "assisting entity").

18. The phrase "external to the affected State" was introduced to reflect the concern, mentioned in the commentary to draft article 13, that the draft articles regulate the activities of actors which are external to the affected State.[9] Accordingly, domestic non-governmental organizations, for example, would not be covered. While this would obviously not be an issue with regard to international organizations, it was nonetheless thought appropriate that it be stipulated, given the nature of the other entities mentioned in the list of assisting actors.

19. The concluding phrase "which is engaged in disaster risk reduction or with the provision of disaster relief assistance" is the same formula used to describe the types of activities being undertaken by the entities in question, which are regulated by the draft articles. In the case of non-governmental organizations, such general indication is to be read together with the more specific description of their role, as provided above.

20. The definition of "other assisting actors" recognizes the fact that such actors may be involved in a range of activities, in the context of both disaster risk reduction and the provision of disaster relief assistance.

(d) "External assistance" refers to relief personnel, equipment and goods, and services provided by assisting States or other assisting actors to an affected State with the objective of preventing, or mitigating the consequences of disasters or meeting the needs of those affected by a disaster

21. The term "external assistance" appears in four of the draft articles already adopted, namely, draft articles 11 (Consent of the affected State to external assistance); 13 (Conditions on the provision of external assistance); 14 (Facilitation of external assistance); and 15 (Termination of external assistance); as well as on proposed draft article 14 bis (Protection of relief personnel, equipment and goods).

22. Subparagraph (d) seeks to define the type of assistance which the draft articles envisage assisting States or other assisting actors providing to the affected State, as a form of cooperation anticipated in draft article 5 bis.

23. The formulation, which draws inspiration from the commentary to draft article 13,[10] is based on both the Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines")[11] and the Framework Convention on Civil Defence Assistance of 2000.[12] The reference to "material", in the Oslo Guidelines was replaced with "equipment and goods", which is the term used in the draft articles, and is further defined below.

24. The phrase "provided by assisting States or other assisting actors to an affected State" is drawn from the commentary to draft article 13, and reiterates the nature of the legal relationship between the assisting State or actor and the affected State, as envisaged in the draft articles.

25. The remainder of the clause seeks to clarify the purpose for which external assistance ought to be provided. The phrase "with the objective of preventing, or

[9] See A/68/10, para. 62, para. (2) of the commentary to draft art. 13.

[10] Ibid.

[11] Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines"), as revised in 2006, para. 2.

[12] See art. 1 (d) (definition of "assistance").

mitigating the consequences of disasters" is drawn from the Framework Convention on Civil Defence Assistance of 2000, and is included as a recognition of the importance of measures intended to reduce the risk of disasters, as envisaged by draft articles 5 ter and 16. The phrase "or meeting the needs of those affected by a disaster" is drawn from the Oslo Guidelines, and alludes to disaster relief assistance provided immediately following the onset of the disaster, which has as its goal the meeting of the needs of those affected by the disaster. While the formulation of the concluding clause is cast in the technical terminology of disaster risk reduction and response, it is understood to accord with the overall purpose of the draft articles, set out in draft article 2, namely to "facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights".

(e) "Equipment and goods" includes supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects necessary for the provision of disaster relief assistance and indispensable for the survival and the fulfilment of the essential needs of the victims of disasters

26. The term "equipment and goods" appears in two of the draft articles already adopted, namely, draft article 5 bis (Forms of cooperation), which uses the term "supplies" instead of "goods", and draft article 14 (Facilitation of external assistance), which uses the expression "goods and equipment", as well as in proposed draft article 14 bis (Protection of relief personnel, equipment and goods).

27. As indicated above, "equipment" and "goods" are a key component of the kind of external assistance being envisaged in the draft articles. The formulation is drawn from the commentary on draft article 14,[13] as well as the International Law Institute resolution.[14] The list covers the types of material generally accepted to be necessary for the provision of disaster relief assistance. That the list is not exhaustive is confirmed by the word "includes" and the reference to "other objects".

28. Generally speaking, two types of material are being envisaged: that required by the disaster relief personnel to perform their functions, both in terms of their own sustenance and in terms of what they require to provide relief, such as supplies, tools and machines; and that which is necessary for the survival and the fulfilment of the essential needs of the victims of disasters, such as foodstuffs, drinking water, medical supplies, means of shelter, clothing and bedding. Search dogs are specifically anticipated in the phrase "specially trained animals", which is drawn from Specific Annex J of the Kyoto Convention.[15]

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[13] See A/68/10, para. 62, para. (5) of the commentary to draft art. 14.

[14] Resolution on humanitarian assistance, adopted by the Institute of International Law, sect. I (1) (a).

[15] International Convention on the Simplification and Harmonization of Customs Procedures ("Kyoto Convention") of 18 May 1973 (United Nations, *Treaty Series*, vol. 950, No. 13561), as revised by the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures of 26 June 1999 (United Nations, *Treaty Series*, vol. 2370, No. 13561) (definition of "relief consignments").

(f) "Relevant non-governmental organization" means any organization, including private and corporate entities, other than a State or governmental or intergovernmental organization, working impartially and with strictly humanitarian motives, which because of its nature, location or expertise, is concerned with disaster risk reduction or the provision of disaster relief assistance

29. The term "relevant non-governmental organization" appears in four of the draft articles already adopted, namely, draft articles 5 (Duty to cooperate), 7 (Human dignity), 10 (Duty of the affected State to seek assistance) and 12 (Offers of assistance).

30. The category of "other assisting actors", which is defined above, includes non-governmental organizations. The definition seeks to distinguish such entities from other actors, specifically States and intergovernmental organizations. The opening clause, "[a]ny organization, including private and corporate entities, other than a State or governmental or intergovernmental organization", which makes such distinction, is drawn from the Tampere Convention.[16] The generic reference to "private and corporate entities" reflects the typical form in which most non-governmental organizations are constituted, but is not meant to be exclusive.

31. The qualifying phrase "working impartially and with strictly humanitarian motives" is drawn from the annex to General Assembly resolution 46/182, and is the basis upon which the activities of such entities are to be performed under the draft articles.[17]

32. The recognition granted to non-governmental organizations in the draft articles is a reflection of the fact that they are typically well-situated to play a pivotal role in relief and related efforts. This is recognized in the phrase "which because of its nature, location or expertise".

33. The activities of non-governmental organizations are not limited to relief assistance, and include those aimed at prevention, mitigation and preparedness. This is recognized in the concluding clause, "is concerned with disaster risk reduction or the provision of disaster relief assistance", the first part of which is drawn from the Tampere Convention. The wording seeks to reflect the broad range of activities in which such entities participate.

(g) "Relief personnel" means specialized personnel, including military personnel, engaged in the provision of disaster relief assistance on behalf of an assisting State or other assisting actors, as appropriate, having at their disposal the necessary equipment and goods

34. The term "relief personnel" appears in two of the draft articles already adopted, namely, draft articles 5 bis (Forms of cooperation) and 14 (Facilitation of external assistance), as well as in proposed draft article 14 bis (Protection of relief personnel, equipment and goods).

35. The subparagraph seeks to define the personnel component of external assistance provided by assisting States or by other assisting actors. The formulation

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[16] Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, of 18 June 1998 (United Nations, *Treaty Series*, vol. 2296, No. 40906), art. 1 (10).

[17] See A/65/10, para. 331, para. (5) of the commentary to draft art. 5.

employed is based on that adopted by the Commission in the commentary to draft article 5 bis,[18] which establishes a nexus between the assisting entity, whether a State or other actor, and the personnel in question through the requirement of "acting on behalf of". Nonetheless, such personnel would be subject to the overall direction and control of the affected State, in accordance with draft article 9.

36. The reference to "specialized" personnel reflects the recognition, in the annex to General Assembly resolution 46/182, that what is to be expected are personnel which enjoy the necessary skill set, and are provided with the "necessary goods and equipment", to perform the functions in question.

37. The phrase "including military personnel", which is drawn from the bilateral treaty between Greece and the Russian Federation of 2000,[19] is intended as a recognition of the important role played by military personnel, as a category of relief personnel, in the provision of disaster relief assistance. The participation of military personnel in the provision of disaster relief assistance is provided for in draft article 14.

38. The traditional application of the concept of "relief personnel" has been in the context of the response to the onset of a disaster. This is reflected in the formulation "engaged in the provision of disaster relief assistance", which mirrors the type of external assistance envisaged in draft article 14, for which the facilitation of "prompt and effective" provision is called for. Nonetheless, it bears pointing out that the definition of "external assistance" above, also anticipates relief personnel being involved in the prevention of disasters. This is a reflection of the more holistic approach taken in the draft articles, as a whole, which includes activities aimed at disaster risk reduction.

(h) "Risk of disasters" means the probability of harmful consequences or losses with regard to human life or health, livelihood, property and economic activity, or damage to the environment, resulting from a disaster

39. The term "risk of disasters" appears in two of the draft articles already adopted, namely, draft articles 5 ter (Cooperation for disaster risk reduction) and 16 (Duty to reduce the risk of disasters).

40. Following on the inclusion of disaster risk reduction within the scope of the draft articles the term "risk of disasters" merits further clarification. The formulation proposed is drawn from the first part of the definition provision found in the ASEAN Agreement.[20] That Agreement sought to link the probability of harmful consequences to "interactions between natural or human-induced hazards and vulnerable conditions". The Commission, however, did not go that far in its work on the definition of "disaster". Accordingly, it was considered more appropriate to simply indicate that such consequences result "from a disaster", which is meant as a *renvoi* to the definition of "disaster" in draft article 3. In other words, the definition of "risk of disasters" is meant as a further elaboration of that of "disaster".

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[18] See A/68/10, para. 62, para. (7) of the commentary to draft art. 5 bis.

[19] Agreement between the Government of the Hellenic Republic and the Government of the Russian Federation on Cooperation in the Field of Prevention and Response to Natural and Man-Made Disasters, of 21 February 2000, art. 1 (definition of "team for providing assistance").

[20] ASEAN Agreement, note 8 above, art. 1 (5).